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In The
Supreme Court of the United States
October Term, 1979

No. **78 - 1369**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS
LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI
COWEN, ROBERT B. ESSEX, FLORENCE FLAST,
CHARLOTTE GREEN, HELEN HENKIN, MARTHA
LATIES, BLANCHE LEWIS, ELLEN MEYER, REV.
ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH
NEIER, DAVID SEELEY, HOWARD M. SQUADRON,
CHARLES H. SUMNER AND CYNTHIA SWANSON,

Appellants,

—against—

EDWARD V. REGAN, as Comptroller of the State of New York,
and GORDON AMBACH, as Commissioner of Education of
the State of New York,

Appellees,

—and—

HORACE MANN-BARNARD SCHOOL, LA SALLE
ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL,
ST. MICHAEL SCHOOL AND YESHIVAH RAMBAM,

Intervening Parties-Appellees.

**BRIEF FOR APPELLEES,
EDWARD V. REGAN AND GORDON AMBACH**

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**BRIEF FOR APPELLEES,
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Statement

The appellants have appealed to this Court from a judgment of a three-judge court in the Southern District of New York, entered on December 20, 1978, dismissing the complaint pursuant to a decision of the three-judge court on December 11, 1978, that

Chapters 507 and 508 of the 1974 Laws of New York do not violate the Establishment Clause of the First Amendment (WARD, D.J., dissenting). The opinions in the District Court are reported at 461 F Supp 1123.

Question Involved

Does the reimbursement by the State of nonpublic schools for actual costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States, where the records are kept and the tests are administered pursuant to requirements of State law and regulation for the purpose of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of actual attendance of pupils upon instruction and in terms of the requirement that such nonpublic schools provide to the pupils so enrolled a prescribed Statewide standard of education?

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is the Establishment of Religion Clause of the First Amendment to the Constitution of the United States, which provides:

"Congress shall make no law respecting the establishment of religion * * *."

The prohibition of that section has been made applicable to the States by virtue of the Fourteenth Amendment to the Constitution of the United States (*Cantwell v. Connecticut*, 310 U.S. 296 [1940]).

Chapter 507 of the New York Laws of 1974 provides as follows in pertinent part.

"Section 1. Legislative findings. The legislature hereby finds and declares that:

"The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

"To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.

"In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

"More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

* * *

"§ 3. Apportionment. The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

* * *

"§ 7. Audit. No application for financial assistance under this act shall be approved except upon audit of

vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

"The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount."

* * *

Chapter 508 of the New York Laws of 1974, amending chapter 507, adds §9 as follows:

"§9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby."

The full text of Chapters 507 and 508 is set out as an Appendix to this Brief.

Facts

Plaintiffs (appellants), who are individual residents of New York State and an association of organizations sharing as a common objective the preservation of the separation of church

and State, commenced this action seeking to have Chapters 507 and 508 of the New York Laws of 1974 declared unconstitutional, alleging that they violate the Establishment Clause of the First Amendment to the Constitution of the United States. Plaintiffs also alleged that the statutes violate the Free Exercise of Religion Clause of the First Amendment in that they prevent the free exercise of the individual plaintiffs' religion through compulsory taxation to support religious schools. The complaint also seeks an injunction restraining the implementation of the laws, insofar as they provide money for sectarian schools.

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the act. The motion was granted.

Interrogatories were served by plaintiffs on the defendants and intervenor-defendants. The answers to those interrogatories have been served on the plaintiffs, filed with the District Court, and are a part of the record in this case.

The facts are not in dispute. On May 23, 1974, then Governor Malcolm Wilson signed Chapters 507 and 508 of the Laws of 1974, to become effective July 1, 1974. The statute directs the Commissioner of Education of the State of New York to apportion and pay to nonpublic schools in the State the actual cost incurred by the schools during the preceding school year for providing services required by law to be rendered to the State in compliance with the requirements of the State's Pupil Evaluation Program (PEP), the Basic Educational Data System (BEDS), Regents Examinations, the Statewide Evaluation Plan, the Uniform Procedure for Pupil Attendance Reporting, and "other similar state prepared examinations and reporting procedures".

Payments are to be made only on vouchers audited by the State Comptroller; the schools must keep records showing ex-

penditures and costs of record keeping and test administration. The Comptroller may also examine the books and records of any qualifying school and if the school is shown to be overpaid, the school must immediately reimburse the State for the amount overpaid.

The expressed purpose of the statute is to provide compensation to the nonpublic schools for those services mandated by State law or by regulations of the Commissioner of Education, in connection with the State's responsibility for reporting, testing and evaluating the quality of education being provided to nonpublic school pupils. The New York State Constitution provides (Article XI, §3) that the State may not use public money "directly or indirectly, in aid or maintenance, *other than for examination or testing*, of any school * * * under the control or direction of any religious denomination * * *" (Emphasis supplied.) The statute recognizes that the costs of the same testing and similar reporting regulations are financed for public schools through public funds.

New York State has set minimum standards of educational quality through the requirements of various sections of the New York Education Law, such as the provisions of Article 17 thereof, which require certain subjects to be taught in nonpublic as well as in public schools, and the provisions of sections 3204 and 3210 of the Education Law, which require that the educational offerings of nonpublic schools must be "at least substantially equivalent" to those of the public schools in the pupil's district of residence. Furthermore, subdivision 2 of section 305 of the Education Law, which provides for the general powers of the Commissioner of Education, states that he shall have the general supervision over all schools and institutions which are subject to the provisions of the Education Law or of any statute relating to education and that he must cause all these schools to be examined and inspected. An outline of statutory requirements is contained in Exhibit 1 to Com-

missioner Nyquist's answers to plaintiffs' interrogatories, entitled "Laws, Regulations and Guidelines Apportionment to Nonpublic Schools".

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, wholly prepared by the State, such as the Regents examinations, which test acquired knowledge relative to specific courses of study, the so-called "PEP Tests" (Pupil Evaluation Program) in grades 3 and 6 as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and nonpublic school pupils.

In addition, various annual reports are required from nonpublic as well as public schools, all of which procedures and devices have the purpose of assuring that the minimum State educational standards are maintained throughout all the schools in the State, both public and nonpublic alike.

Pursuant to the requirements of Chapter 507, the State Education Department has adopted a system of accounts which must be maintained by nonpublic schools receiving aid pursuant to the act, which system requires the maintenance of accounts showing the actual costs to the schools for personal services, supplies, materials, and other contractual expenses, of the Pupil Evaluation Program, Basic Educational Data System, Regents Examinations, the Statewide Evaluation Program, and Pupil Attendance Reporting. It is those actual costs upon which reimbursement is based.

A Stipulation of Facts, dated September 26, 1977, and filed with the District Court, contains samples of the tests at issue in the action and of the various required reports and statements of expenses. It was filed with this Court in conjunction with our motion to dismiss or affirm.

ARGUMENT

The compensation of nonpublic schools for secular non-teaching services rendered to the State for State purposes does not constitute an establishment of or aid to religion.

No one will question that a State may not use tax money for the support of religion. That, however, is not at issue in this case. What is at issue here is a statute which provides for reimbursement to nonpublic schools of the costs of informational services provided by those schools to the State as a result of the mandates of statutes or regulations. New York State must permit children to attend nonpublic schools, including sectarian schools, if they so desire; that is their constitutional right. At the same time, however, New York State has a legitimate area of concern in ascertaining that those children do attend school, as required by the compulsory Education Law of the State of New York, and that the schools they attend provide an education which meets State minimum standards. To obtain this information, New York State requires all schools, both public and nonpublic, to maintain records of attendance, to administer certain specific State tests and to report to the State on the information contained in these records and ascertained from the tests. Public schools are partially reimbursed for these services in the form of State aid. The statutes here at issue provide reimbursement to the nonpublic schools of only the actual cost of keeping the records, administering tests and reporting the results to the State. The moneys so provided are not provided to pay for the costs of educating children, but only to pay for the costs of informational services designed to determine whether, in fact, the children are in school and are being taught the basic State curriculum.

What is prohibited by the Establishment Clause is aid directed to the advancement of religion. Programs having the purpose of securing information necessary to determine if State laws,

regarding attendance at schools and minimal educational standards, are being met are not directed to the aid of religion; they do not have as their objective aid to any or all religions, but only assist the State in securing necessary information, and assist children in assuring that the schools they attend provide adequate educational programs. This program does not, therefore, constitute an establishment of religion.

The compensation of schools for provision of informational services to the State has a primarily secular effect and purpose. It does not, therefore, constitute an establishment of religion in violation of the prohibitions of the First Amendment.

Where the purpose and effect of the statute is solely to provide reimbursement for noneducational services provided to the State and not to assist the nonpublic schools in their educational functions, there is neither room for nor possibility of excessive entanglements between the church and State. With or without compensation, the State may require and the schools must provide information as to compliance with the compulsory attendance laws and with the requirements of minimal educational standards. The mere fact that the State sees fit to compensate the schools for the cost of providing the information required by the State does not render either the program or the reimbursement unconstitutional, either in the historic concept of the First Amendment or as it has been interpreted by the Supreme Court of the United States.

A. *Factually, the New York Legislature's intent in enacting Chapters 507 and 508 of the Laws of 1974 was to compensate schools for providing required information to the State, concerning compliance with the State's Education Law by nonpublic schools.*

The expressed purpose of Chapters 507 and 508 of the New York Laws of 1974 is to compensate nonpublic schools, without

regard to whether they are sectarian or nonsectarian in nature, for expenses incurred by those schools in keeping records, administering tests, and filing reports as required by State law and regulation.

New York's legislative history clearly shows the inclusion of nonpublic schools within the State's ambit of educational concern. For example, in the State of New York, nonpublic schools are chartered by the 200-year-old Board of Regents of the University of the State of New York (New York Education Law, §§2, 216 [McKinney's Cons Laws of NY, Book 16]). Regents' diplomas are awarded to students at nonpublic and public schools alike upon satisfactory completion of Regents' examinations (Education Law, § 209). There is regular inspection by the State Education Department of the nonpublic as well as the public schools (Education Law, § 305[2]). Nonpublic schools are exempt from taxation (New York Real Property Tax Law, §420 [McKinney's Cons Laws of NY, Book 49 A]). Attendance at a nonpublic school complies with the State's compulsory education law (Education Law, § 3204) and satisfies the requirements for part-time attendance (Education Law, § 4601). Conditions of attendance in the nonpublic as well as the public schools are prescribed (Education Law, §§ 3204-3205), and certain curriculum requirements are imposed (Education Law, §§ 3204, 801-811, 3002).

The State has not only imposed these requirements on the nonpublic schools but it has also recognized the importance of insuring that these requirements are complied with by both sectarian and nonsectarian nonpublic schools. In furtherance of that interest an exception was incorporated into the New York State Constitution's prohibition against the use of public moneys in aid of denominational schools, authorizing the use of public moneys "for examination or inspection" of those schools (New York Constitution, Article XI, §3). The draftsmen of that exception, incorporated into the State Constitution in 1894, stated in their report to the Constitutional Convention:

" * * * In the opinion of the committee there is no demand from the people of the State upon this convention so unmistakable, widespread and urgent; none, moreover, so well grounded in right and reason, as that the public school system of the State shall be forever protected by constitutional safeguards from all sectarian influence or interference, and that public money shall not be used, directly or indirectly, to propagate denominational tenets or doctrines. We have sought to give the clearest and strongest expression possible to these principles in the proposed section * * *"

"There is one exceptional case provided for in the first sentence of this section, in which public money may be used in connection with a sectarian school or institution of learning, and that is contained in the words, 'otherwise than for examination or inspection' of such institutions. *This exception, in our opinion, in no way affects the principle, except in so far as it emphasizes even more strongly the interest and latent power of the State with regard to all institutions of learning.* * * * [T]he supervision * * * and the system of regular examinations by which the efficiency of these institutions [sectarian and non-sectarian academies] is tested * * * extends the uniformity of excellence maintained by State institutions to those under private and sectarian control * * *" New York State Constitutional Convention of 1894 Documents (Doc No 62, the Report of the Committee on Education, pp 15-17) (emphasis supplied).

Compulsory school attendance laws and the imposition of standards and reporting requirements by the states on nonpublic schools including sectarian schools, have, of course been consistently upheld, over objections predicated on the constitutional right to free exercise of religion, as a legitimate exercise of the police power of the State (*Meyerkorth v State*, 173 Neb 889, 115 NW2d 585 [1962], app dsmd for want of subs fed ques, 372 US 705 [1963], and cases there cited; see also *Board of Education v Allen*, 392 US 236, 246 N 7). Compulsory attendance is enforced by the State as *parens patriae*; violation will result in a neglect

proceeding against the parent. New York Family Court Act, §1012(f)(i)(A) [McKinney's Cons Laws of NY, Book 29A, Part 1].

As of February, 1975, when Commissioner Nyquist's answers to plaintiffs' interrogatories were prepared, there were 1,954 nonpublic schools in the State of New York (Exh 7). Some of the required services performed by those schools include the administration of the tests described above, providing transfer records, certifying grades, providing health transfer records, providing information under the Basic Educational Data System (BEDS), which includes statistical information as to students, teachers, curricula offered, physical plant, etc., statistical data pertaining only to nonpublic secondary schools, somewhat more detailed in nature and type of information than the Basic Educational Data System, maintaining health services records, administering examinations to students not qualifying for a Regents diploma and maintaining those records for inspection, and maintaining attendance records. The statutes at issue here, however, do not provide for compensation for the cost of all those services. Only the costs of Statewide tests, the BEDS reports, and attendance reporting are compensated.

These requirements, imposed upon the nonpublic schools by law or regulation, involve considerable additional expense to the schools for which, immediately prior to the enactment of Chapters 507 and 508, the nonpublic schools were not compensated, although public schools do receive compensation in the form of State aid for similar services which they render to the State.

Nor is this a new program. While immediately prior to the enactment of Chapters 507 and 508 in 1974, nonpublic schools were not compensated for the expenses of examination and inspection required by the State, until 1968 certain nonpublic schools were so compensated and had been since 1892. That provision was incorporated in the New York Education Law in

the consolidation of 1909 as section 453 and was continued and renumbered as section 493 in the consolidation of 1910 (L 1910, ch 140). The provision thereafter remained unchanged until its repeal in 1930 (L 1930, ch 171). However, even after the repeal of section 493, the State's Local Assistance Appropriation Bills (the appropriation for State aid) contained, until 1968, an appropriation of \$35,000 in connection with the "attendance requirements of academic pupils at academies meeting the requirements of regents rule". These moneys were apportioned and paid as they have been prior to 1930 to sectarian and nonsectarian schools alike.

In 1970, the State attempted to reinstate the past practice of compensating nonpublic schools for services required of them by the State. By Chapter 138 of the New York Laws of 1970, the State adopted a program to partially reimburse nonpublic schools for the costs of record keeping and test administration. That statute, however, unlike the ones at issue here, included the costs of teacher-prepared tests among those for which reimbursement was made. In holding Chapter 138 unconstitutional, as contravening the Establishment Clause of the First Amendment to the Constitution of the United States, this Court found teacher-prepared tests to be "an integral part of the teaching process" (*Levitt v Committee for Public Education and Religious Liberty*, 413 US 472, 481 [1973]). Consequently, the 1970 statute provided the possibility of compensation by the State for costs of sectarian teaching. In regard to these tests, the Court said (p 480):

"... [N]o attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction."

The Court also pointed out that while the statute prohibited the use for religious purposes of moneys received under the act, there was no mechanism provided which could insure that result (p 477):

"However, the Act contains no provision authorizing state audits of school financial records to determine whether a school's actual costs in complying with the mandated services are less than the annual lump sum payment."

The 1974 statutes here before the Court attempt to meet the objections to the 1970 law expressed in the *Levitt* opinion. Teacher-prepared tests have been eliminated from eligibility for compensation; only actual costs of State tests and record keeping are to be reimbursed, payments are based on detailed vouchers showing costs of services rendered, the State Comptroller is given the discretion to audit the accounts and records of any school to check the cost figures submitted to the State, and there is a provision for recoupment by the State of excess payments.

The 1974 statutes clearly express their intention to provide compensation for the provision of secular informational services to the State. Chapter 507, §1 provides:

"The State has the responsibility to provide educational opportunity for a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

"To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.

. . . .

"It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating."

It is thus clear that the purpose of Chapters 507 and 508 is to compensate nonpublic schools solely for providing testing and informational services to the State which are nonsectarian in nature and which serve the State's purpose of examination and inspection of nonpublic schools. Such services assure that the children attending nonpublic schools are complying with the State's compulsory attendance law and that the schools meet minimal standards of educational quality. The payments are not made for the purpose or with the effect of aiding the educational or teaching mission of the schools.

B. *The payment to nonpublic schools, both sectarian and nonsectarian alike, of reimbursement for expenses incurred in fulfilling State examination, record keeping, and reporting requirements does not constitute an establishment of religion in the historical context of the First Amendment.*

While, of course, the extent of the First Amendment's application to present-day statutes is not limited to the concepts of the drafters of the Amendment, the meaning which they ascribed to it has been considered in depth by this Court in applying the Amendment to current situations (see, e.g., *Everson v. Board of Education*, 330 U.S. 1 [1947]; *Abington School District v. Schempp*, 374 U.S. 203 [1963]; concurring opinions of Justices DOUGLAS and BRENNAN in *Lemon v. Kurtzman*, 403 U.S. 602 [1971]).

When the early settlers came to this country from Europe, they brought with them, not only political and social customs, but also many of the religious problems which were indigenous to their countries of origin. In Europe there were religions established and supported by government, a factor which engendered many of the emigrations which founded the United States. Persecution in the name of religion drove many colonists from Europe to America. But those same practices were, in

many instances, transplanted to the New World and, at the time of the adoption of the Constitution and the Bill of Rights, there were established churches in a majority of the original Thirteen Colonies and almost every state exacted some kind of tax for church support. In the language of the opinion of this Court in the *Everson* case, *supra* (p. 11):

"These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment."

Consequently, the original and prime intent of the First Amendment was to prohibit the direct establishment of a national church and to further prohibit the direct support of any one religion or of all religions.

But what of statutes and government actions other than direct establishment?

Sectarian property and income is tax exempt (*Walz v. Tax Commission*, 397 U.S. 664 [1970]); clergymen and divinity students have been made exempt from the draft, as are conscientious objectors; the Bible is used for administering oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; Federal funds were made available to sectarian institutions to repair buildings and replace equipment lost or damaged in the floods of June, 1972; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act.¹

Many other Federal statutes have provided nondiscriminatory aid to students attending both public and nonpublic schools, both

¹Hill-Burton Act of 1946, 60 Stat. 1040, 42 USC §§ 29-92.

directly and through the institutions they attend. Among these are the National School Lunch Act,² free milk under the Agriculture Act of 1949,³ the National Defense Education Act of 1958,⁴ College Housing Act of 1950,⁵ the Higher Education Facilities Act,⁶ the Higher Education Act,⁷ the Elementary and Secondary Education Act,⁸ the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of 35 denominations,⁹ and the G.I. Bill of Rights.¹⁰

From this listing we must assume that either the Congress and the Presidents have been totally wrong as to permissible government action under the First Amendment, or that the Amendment does not bar nonpreferential payments of public money to all schools, all pupils, or all institutions, regardless of religious affiliation, and that where valid secular purposes are the primary basis for the payment of public money, such payments are constitutional and valid.

²60 Stat. 230 (1946), 42 USC § 1751.

³63 Stat. 1051 (1949), 7 USC § 1431.

⁴72 Stat. 1580 (1958), 20 USC §§ 401-589.

⁵12 USC §§ 1749-1749e.

⁶77 Stat. 363 (1963), 20 USC §§ 701-757, *Tilton v. Richardson*, 403 US 672 (1971).

⁷79 Stat. 1219 (1965), 20 USC §§ 1001-1144.

⁸79 Stat. 27 (1965), 20 USC §§ 236-244, 331-332.

⁹58 Stat. 765 (1944), 40 USC §§ 484 (j) and 484(k); 107 Cong Rec 17351.

¹⁰66 Stat. 663 (1952), 38 USC § 911.

- C. ***The payment to nonpublic schools, both sectarian and nonsectarian alike, of reimbursement for expenses incurred in fulfilling State examination, record keeping, and reporting requirements does not constitute an establishment of religion as defined by the decisions of this Court, but is rather a constitutional use of State funds for State purposes.***

Probably the most often quoted case, on both sides of the establishment argument, is the *Everson* case (*Everson v. Board of Education*, 330 US 1 [1947]). In that case the Supreme Court of the United States held that the nonpreferential providing of school bus transportation for children attending both public and nonpublic schools did not constitute aid to or an establishment of religion. In so holding, the Court, in an opinion by Mr. Justice BLACK, clearly set forth the purpose and intent of the Establishment Clause, stating (pp 15-16):

"The 'establishment of religion' clause of the First amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."

The common denominator in all the activities there stated to be prohibited is that the law, activity, or tax must be directed to the aid of religion as such. That opinion did not declare to be prohibited general public programs not intended or directed to

the aid of religion which incidentally or collaterally aid a religious institution.

Even more recently than *Everson*, a decision of the Supreme Court of the United States has clearly held that laws are not rendered invalid solely because there may be some indirect or collateral aid to proponents of a religious belief or to sectarian institutions. In the Sunday-closing cases, the Court upheld the validity of laws making Sunday a universal day of rest in the face of the admittedly religious origin of those laws and the fact that their current enforcement incidentally aids certain religious denominations in the profession of their beliefs. In so holding, the Court interpreted the Establishment Clause "in the light of its history and the evils it was designed forever to suppress" (*McGowan v. Maryland*, 366 U.S. 420, 442 [1961]). The opinion further states (p. 442):

" * * * the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenents [sic] of some or all religions."

Furthermore, as the Court said in *Everson*, (*supra*, 330 U.S., p. 18):

"That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

In the instant case, where the State has imposed these record keeping, examination and reporting requirements upon the nonpublic schools for State purposes, to deny the State the right to compensate the schools for the cost of fulfilling those requirements would be, in effect, requiring the State to be the adversary of religious institutions.

Mr. Justice FRANKFURTER, concurring in *McGowan, supra*, stated the purpose of the Establishment Clause to be simply to assure that religion, as religion, would not be made the object of legislation (366 U.S., p. 465). In this regard, he stated, the object of the legislation must be determined (pp. 466-467):

"To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine — primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion — the regulation is beyond the power of the state. This was the case in *McCullum*. Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone — where the same secular ends could equally be attained by means which do not have consequences for the promotion of religion — the statute cannot stand. A State may not endow a church although that church might inculcate in its parishioners moral concepts deemed to make them better citizens, because the very *raison d'être* of a church, as opposed to any other school of civilly serviceable morals, is the predication of religious doctrine. However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, *Pierce v. Society of Sisters*, 268 U.S. 510, that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment,' even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone."

In the same opinion, rejecting a plea to look behind the legislative findings of the statutes there involved, Mr. Justice FRANKFURTER also observed (p. 469):

" * * * the private and unformulated influences which may work upon legislation are not open to judicial probing. 'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' *McCray v. United States*, 195 U.S. 27, 56. 'Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts.' "

Applying these decisions to the instant case, we observe the following factors. The intent of the statute was set forth in the statement of legislative policy in Chapter 507, as has been quoted previously in this brief. That statement may be summarized to show intent to assure that students who elect to attend non-public schools are actually in daily attendance at those schools; that they receive an education with at least minimum requirements, both in course content and teacher qualifications; and that the education they receive is adequate for them to reach levels of achievement at least on a level with students in public schools. The statute demonstrates a secular policy of assuring equality of educational opportunity to all children.

Of greatest significance in determining the validity of the statute here involved are the decisions of this Court in *Lemon v. Kurtzman* (403 US 602 [1971]) and *Tilton v. Richardson* (403 US 672 [1971]); *Levitt v. Committee of Public Education and Religious Liberty* (413 US 473 [1973]); *Committee for Public Education and Religious Liberty v. Nyquist* (413 US 756 [1973]); *Meek v. Pittenger* (421 US 349 [1975]); and *Wolman v. Walter* (433 US 299 [1977]) as the latest examination of that issue. An

analysis of those opinions, we submit, clearly shows that the program enacted by Chapters 507 and 508 is not prohibited under the decisions of this Court and is, in fact, a valid, constitutional program of the State.

In the *Lemon* case, the Court was confronted with two statutes, one of which provided a subsidy for the payment of the salaries of teachers in nonpublic schools and the other provided compensation to the schools for the teaching of certain secular subjects by the nonpublic schools. In *Tilton*, the Federal Higher Education Facilities Act, providing for the construction of college academic buildings, was involved.

Examining the statutes in those cases, this Court observed in *Lemon* (403 U.S., p. 612):

"Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation [between constitutionality and unconstitutionality] in this extraordinarily sensitive area of constitutional law."

and again (p. 614):

"Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

In *Tilton*, the Court repeated the statement in *Lemon*, first above quoted, as applicable to that case as well (403 U.S., p. 678).

The tests of constitutionality were stated in *Lemon* as being (pp. 612-613):

"In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

. . .

" . . . Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz, supra*, at 674."

In *Tilton*, the Court said (p. 679):

"The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In applying those tests, this Court stated in *Lemon* (p. 615):

"In order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."

In the instant case, while the character and purpose of the institutions receiving the money may be the same as those in *Lemon*, the nature of the payments so provided and the resultant relationship between government and religion are vastly different.

This Court in the cases above cited recognized that the State has certain legitimate concerns which establish a legitimate area of contact with sectarian schools, and that certain types of aid or payments are by their nature constitutional, even though they may provide some indirect benefit to the sectarian mission of the schools. In that regard, the Court said in *Lemon* (403 U.S., p. 613):

"A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."

and again at page 614:

"Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts."

In that regard, it should be noted, Chapters 507 and 508 are directed, in part at least, to assuring compliance with the compulsory attendance laws of the State of New York.

Further, in *Lemon*, the Court also observed (pp. 616-617):

"Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

In *Tilton*, the Court rejected any theory that all financial aid to sectarian institutions was constitutionally prohibited, stating (p. 679):

"The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld."

In the instant case, the aid involved is secular, neutral and non-ideological. It compensates all nonpublic schools, sectarian and non-sectarian alike, for record keeping, testing and

reporting, required by the State in enforcing the compulsory school attendance laws and for the purpose of assuring that the schools are fulfilling requirements of State law and regulation providing for minimal educational standards. The tests for which compensation is made are entirely State devised tests, administered in both public and nonpublic schools pursuant to State requirements, designed to measure compliance with the minimal educational standard requirements. These testing, record keeping and reporting functions are both secular and non-ideological in nature.

Although compensation of the schools at cost for these non-ideological services will free other money of the schools so that it could be used to advance the sectarian mission of the schools, or for the improvement of secular educational services, that factor alone is not a basis for invalidation of the statute, as the Court observed in *Tilton*, as quoted above.

While invalidating the statutes at issue in the *Lemon* case, the Court also found that a "comprehensive, discriminating, and continued state surveillance will be inevitably required" to insure that restrictions against the use of the money, there provided, for sectarian purposes would be obeyed. The Supreme Court was concerned about the extent of the inspection and auditing which would be required to determine the amount of a school's expenditures for secular versus sectarian education for the purpose of determining the amount of compensation to be paid. This, the Court found, would result in "excessive entanglement" between government and religion. Here, however, there is no need for continuing surveillance. In the case of the statutes here at issue, there is provision only for maintenance of records and accounts which can be audited at the option of the State Comptroller, and submission of vouchers for reimbursements based on the actual cost of administering the tests and keeping the required records. There is no surveillance

required to determine that funds are not used for religious education since, unlike the situation in *Lemon*, there is no reimbursement for teaching services.

Significantly, in *Tilton*, upholding the Federal Act there involved, this Court observed that "The entanglement between church and state is also lessened here by the nonideological character of the aid which the government provides." The Pennsylvania and Rhode Island statutes involved in *Lemon* were distinguished on the basis that "There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities."

The statutes in the instant case are immeasurably different from those invalidated in *Lemon*. The aid here is secular, nonideological and neutral in nature. It does not involve annual audits or constant governmental surveillance over expenditures. It merely compensates the schools for the costs they incur in providing record keeping and testing services required by the State in enforcing compulsory school attendance laws and laws requiring attainment of minimal educational standards by the nonpublic schools.

The education of our Nation's children has, quite properly, been recognized by this Court as a proper subject of state legislation enacted in furtherance of a public interest (*Cochran v. Louisiana State Board of Education*, 281 U.S. 370 [1930]; *Board of Education v. Allen*, 392 U.S. 236 [1968]). It is neither necessary nor constitutionally permissible to require that educational pursuits be followed only in public institutions of learning. Rather, educational goals may effectively be satisfied through private education (*Pierce v. Society of Sisters*, 268 U.S. 510 [1925]). As a corollary to the *Pierce* decision and considering the State's interest in satisfying its compulsory attendance laws through private educational institutions, the Court, in the *Allen* case, observed (392 U.S., p. 247):

" * * * if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular function."

The statutes here in question do not involve the State in the actual educational process of the schools. They do not compensate them for their teaching function as such. They do no more than compensate all private schools, sectarian and non-sectarian alike, for the expenses of record keeping and administration of examinations necessary to assure that those schools are maintaining that quality of secular education which is necessary for the young people of the State, that is, in determining the "manner in which those schools perform their secular function."

In *Allen*, the Supreme Court further observed as to the nature of nonpublic schools (p. 245):

"The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However this Court has long recognized that religious schools pursue two goals, religious instruction and secular education."

The compensation here provided by Chapters 507 and 508 is directed solely toward the secular function of the schools. It compensates for services directly and solely related to the State's secular interests in the schools.

As to the powers of the states in regulation of nonpublic schools the Supreme Court stated in *Allen* (pp. 245-246):

"Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."

If the State may establish such regulations, and consequently require compliance with record keeping, reporting and testing requirements in order to assure compliance with these regulations, then surely the State should be allowed to alleviate the cost burden it has imposed on the schools.

The Court in *Meek v. Pittenger*, *supra*, reasserted the principles in *Allen* and approved the Pennsylvania textbook statutes there at issue. The Court did, however, disapprove compensation for teaching services, even though remedial in nature, a factor not at issue here.

In *Levitt v. Committee for Public Education and Religious Liberty*, *supra*, the New York statute provided for payments to nonpublic schools to reimburse them for costs of record keeping and testing, including teacher prepared tests. Comparing the fact situation at issue there and in *Committee for Public Education and Religious Liberty v. Nyquist*, decided the same day, the opinion of this Court stated (413 US, pp 479-480):

"The statute now before us, as written and as applied by the Commissioner of Education, contains some of the same constitutional flaws that led the Court to its decision in *Nyquist*.⁷ As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various 'services.' Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction."

⁷We do not doubt that the New York Legislature had a 'secular legislative purpose' in enacting Chapter 138. See *Epperson v. Arkansas*, 393 U.S. 97 (1968). The first section of the Act provides that the State has a 'primary responsibility' to assure that its youth receive an adequate education; that the State has the 'duty and authority' to examine and inspect all schools within its borders to make sure that adequate educational opportunities are being provided; and that the State has a legitimate interest in assisting those schools insofar as they aid the State in fulfilling its responsibility."

Distinguishing *Everson* and *Allen*, the Court held (413 U.S., p. 481):

"In this case, however, we are faced with state-supported activities of a substantially different character from bus rides or state-provided textbooks. Routine teacher-prepared tests, as noted by the District Court, are 'an integral part of the teaching process.' 342 F. Supp., at 444. And, '[i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.' *Lemon v. Kurtzman*, *supra*, 403 U.S., at 617."

It is submitted that the determinative difference between Chapter 138, held invalid in *Levitt*, and Chapters 507 and 508, at issue here, is the absence in the latter statutes of compensation for teacher-prepared tests. This is apparent from the conclusion of the Court's opinion in *Levitt* (413 U.S., p. 482):

"We hold that the lump sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial function."

Here there are no teacher-prepared tests, no single per-pupil allotment, but only a statute providing for reimbursement for the actual cost of administering State-prepared and mandated tests and maintaining attendance records.

It is necessarily a secular purpose and intent to assure that children attending nonpublic schools comply with the compulsory attendance laws of the State, that they are receiving an adequate education from qualified teachers, and that they are tested in accordance with State standards of academic

achievement. Since these are secular, neutral and non-ideological requirements and services, fulfilling State-imposed requirements, and since the moneys apportioned to the non-public schools are solely for the purpose of compensating them for those required secular services, then neither the purpose nor the primary effect of the enactment is the advancement or inhibition of religion.

One final quotation from the *Allen* case, which was followed in *Meek v. Pittenger*, *supra*, is pertinent here, summarizing the relationship of the sectarian function to the secular education function of the private schools as viewed by this Court. The Court there stated (392 U.S. 247-248):

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

If the State may expend public moneys to insure that public schools provide minimal levels of education, if the nonpublic schools are a constitutionally acceptable conduit for the teaching of children in secular subjects, if the State may require that nonpublic schools meet specific standards of minimal educational offerings and achievement, and if the State may

require that nonpublic schools keep records, administer tests and report thereon in order to assure that they comply with State-imposed educational requirements, then the State must also be able to spend public moneys to assure that these schools actually do perform in an acceptable manner and that students attend in compliance with the compulsory education laws. That permissible expenditure of public moneys must include the right to compensate the schools for the expenses imposed upon them by the examination and inspection requirements of the State.

Chapters 507 and 508 of the New York Laws of 1974 have a secular legislative intent and a primary effect which neither advance nor inhibit religion. The payments provided under those acts are for neutral, secular and non-ideological services to the State by the nonpublic schools. The provision for those payments does not involve an excessive entanglement between government and religion. The statutes, therefore, do not violate the Establishment Clause of the First Amendment to the Constitution of the United States and are, consequently, constitutional.

D. *The constitutionality of the statutes here at issue is confirmed by the decision in Wolman v. Walter.*

Inevitably, the 1974 statutes were challenged on constitutional grounds by the same group of individuals who had mounted the attack in *Levitt*. At first the three-judge court in the Southern District of New York held the new statutes unconstitutional. Although it found a secular legislative purpose (the first part of a three-part test devised in earlier decisions of this Court, see *Lemon v. Kurtzman*, *supra*, 403 US 602, it also concluded that the "primary effect" of the new scheme was to advance religion, based on this Court's decision in *Meek v. Pittenger*, *supra*, 421 US 349. Writing for the Court, District Judge WARD said:

"Absent the decision in *Meek v. Pittenger*, *supra*, we might have found defendants' arguments persuasive. However, in light of the decision in *Meek*, we fail to see any alternative but to declare the statute unconstitutional because it has the primary effect of advancing religion" (414 F Supp 1174, 1179).

On appeal to this Court by defendants, the judgment appealed from was vacated and the case remanded for further consideration in the light of *Wolman v. Walter*, 433 US 229, decided June 24, 1977. Following remand, the same three-judge court sustained the constitutionality of the statute (Judge WARD dissenting) upon the decision of *Wolman*, *supra*, (461 F Supp 1123).

It seems from the foregoing history of this matter that at least in June 1977, when the case was remanded, the decision in *Meek v. Pittenger* was not regarded by a majority of this Court as conclusive on the present case.

The Court below explained its earlier decision in the present case by saying it had concluded that *Meek v. Pittenger* held that "substantial aid to the educational function of [sectarian] schools * * * necessarily results in aid to the sectarian school enterprise as a whole". In other words, no distinction could be drawn between the secular and religious dimensions of education provided in sectarian schools, and thus, both aided the sectarian enterprise.

The Court in *Wolman*, *supra*, held constitutional a variety of State-supported services and programs in Ohio for nonpublic schools, including textbooks, diagnostic health services, and testing. In considering the programs before the Court in *Wolman*, the majority set out the findings which must be made to sustain State programs relative to non-public schools (433 US 236):

"In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion."

In upholding the Ohio testing program, the Court specifically distinguished its decision in *Levitt v. Committee for Public Education and Religious Liberty*, *supra* (413 US 472), which had invalidated the previous New York State program, which included reimbursement for teacher-prepared tests. As to that case, the Court in *Wolman* stated (433 US 239, 240):

"In *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973), this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for the expenses of teacher-prepared testing. The reasoning behind that decision was straightforward. The system was held unconstitutional because 'no means are available, to assure that internally prepared tests are free of religious instruction.' * * * *Id.*, at 480.

"There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. *Id.*, at 479-480, n7. The State may require that schools that are utilized to fulfill the State's compulsory education requirement meet certain standards of instruction, *Allen*, 392 U.S. at 245-246, and n.7, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled. *Levitt*, 413 U.S., at 479-480, n.7; *Lemon*, 403 U.S., at 614. See App. 28. Cf. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*. Similarly, the inability of the school to control the test eliminates the need for supervision that gives rise to excessive entanglement".

That decision provides the standard by which the statute here at issue should be measured, a standard by which the statute should be found constitutional.

The tests involved in the present statute are all State-prepared — there are no teacher-prepared examinations involved. The tests are a measuring device by which the State can assure that students in nonpublic schools are receiving an adequate secular education and that minimum educational standards are being met. The nonpublic school does not control the content of the test.

An examination of the tests involved further reinforces constitutionality of the program. The Regents examinations are State-prepared examinations utilized to test student achievement in 19 subjects at the secondary school level in both public and nonpublic schools. While they are graded in the schools, scoring keys and rating guides are provided by the State Education Department. In most subjects, the examinations are entirely objective and there is no element of teacher judgment involved. Only in English and Social Studies are there any essay questions, and there are severe limitations on the opportunity for subjective grading. For example, English composition questions must be selected from a subject matter list provided to the student by the State; the teacher cannot select topics or limit the choices from the list. Moreover, it is the competency of the writing *qua* English composition which is tested, not the content. Five percent of all examinations for each school are returned to the State Education Department for review to determine if errors in marking are being made. What little chance for subjective judgment in grading is available to a nonpublic school teacher is also available to the public school teacher grading the identical examination and does not provide an opportunity to influence the underlying subject matter of the questions so as to insert religious teaching into the examination process.

There are five basic competency tests required to be administered to students at certain grade levels. Four of those tests are completely objective and, indeed, can be machine marked, so that no subjective element can be inserted in their marking and the schools have no part in the development of the questions. The fifth test, which measures writing skills, allows for subjective judgment as to the answers, but once again no part is played by the teacher in developing the questions and thus no sectarian teaching goals can be inserted into the tests.

The Pupil Evaluation Program (PEP) Tests which are mandated in grades 3 and 6 and are optional in grade 9 test student achievement and progress in reading and mathematics. These tests are solely objective and can be machine, as well as hand, marked. The tests are used to measure Statewide, community and school trends in pupil achievement and are functionally related to Title I of the 1965 Elementary and Secondary Education Act (79 Stat. 27, 20 USC §236 *et seq.*).

The State also requires an annual report from all schools, both public and nonpublic, called the Basic Educational Data System (BEDS). This report compiles information as to staff, pupils and school facilities. A similar secondary school report is also required to be annually filed with the State Education Department.

Each school is required to keep attendance records and file an annual attendance report with the State Education Department. This report is within the State's sphere of interest to determine compliance with compulsory school attendance laws.

The Regents Scholarship and College Qualification Test has been used as a basis for Regents' diplomas and in awarding Regents' scholarships to New York State high school graduates; in addition the test is used as an entrance examination for various units of the State University of New York. These examinations are State-prepared and State-scored.

Copies of the tests and reports are attached as exhibits to the fact stipulation entered into by the parties on September 26, 1977 and filed with this Court.

Unlike the tests at issue in *Levitt*, the nonpublic school teachers have no input into the contents of any of the examinations used; only in one or two Regents examinations can any subjective judgment enter into grading the examinations, and even that is severely restricted by the answer keys and rating guides (see, e.g., Exh 27, Pts II and III, and Exh 31).

Consequently, the basis for invalidation of the statute in *Levitt*, i.e., the lack of available means "to assure that internally prepared tests are free of religious instruction," does not exist as to the tests for which reimbursement is provided by Chapters 507 and 508. Like the testing program held constitutional in *Wolman*, this program should be held constitutional here.

The majority below concluded that *Wolman* "must be viewed as rejecting the concept that State support for educational activities necessarily advances religion." The Court then gave consideration to whether the points of difference between the Ohio statute and the New York law were significant enough to render *Wolman* inapplicable. Again, the majority concluded that the risk of New York examinations being diverted to religious purposes "is altogether too insubstantial". Writing for the majority, Circuit Judge MANSFIELD said:

" * * * The secular nature of the examinations and the almost entirely mechanical method prescribed for their administration as well as for attendance-taking precludes any substantial risk that the examinations or services will be used for injection or inculcation of religious views or principles, even in a pervasive religious atmosphere.

The careful auditing procedure, moreover, insures that State aid will be restricted to these secular services." (461 F Supp at 1128)

Turning to the attendance-taking feature of the New York statute (not present in *Wolman*), the majority found that record keeping is "essentially a ministerial task lacking ideological content or use * * *" (461 F Supp at 1130).

In short, the same three-judge District Court which had declared these statutes unconstitutional in 1976 on the strength of *Meek v. Pittenger*, *supra*, now finds persuasive distinctions in this Court's more recent *Wolman* decision which are sufficient to uphold the statutes. In *Wolman*, this Court has adhered to its position in earlier cases (not followed in *Meek*) which permits State aid to those parts of a sectarian school's educational activities which have only secular values of legitimate interest to the State and which aid "does not present any appreciable risk of being used to aid transmission of religious views."

The decision below is in accord with prior decisions of this Court as expressed in *Wolman v. Walter*, *surpa*.

CONCLUSION

The Judgment appealed from should be affirmed.

Dated:

Respectfully submitted,

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APPENDIX

A-1

APPENDIX

**Full Text of Chapter 507, New York Laws of 1974, as
Amended by Chapter 508, New York Laws of 1974**

AN ACT

To provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that:

The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

To fill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being educated within their individual capabilities.

In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such

nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

§ 2. Definitions.

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 3. Apportionment.

The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the state-wide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

§ 4. Application.

Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

§ 5. Maintenance of records.

Each school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed in connection with the reporting, testing and evaluation program enumerated in section three of this act. Such records and accounts shall contain such information and be maintained in accordance with regulations issued by the commissioner, but for expenditures made in the school year nineteen hundred seventy-three-seventy-four, the application for reimbursement made in nineteen hundred seventy-four pursuant to section four of this act shall be supported by such reports and documents as the commissioner shall require. In promulgating such record and account regulations and in requiring supportive documents with respect to expenditures incurred in the school year nineteen hundred seventy-three-four, the commissioner shall facilitate the audit procedures described in section seven of this act. The records and accounts for each school year shall be preserved at the school until the completion of such audit procedures.

§ 6. Payment.

No payment to a qualifying school shall be made until the commissioner has approved the application submitted pursuant to section four of this act.

§ 7. Audit.

No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

The state department of audit and control shall from time to time examine any and all necessary accounts and records of a

qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

§ 8. Noncorporate entities.

Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate entity as may be designated for such purpose pursuant to regulations promulgated by the commissioner. A school which is a corporate entity may designate another corporate entity for the purpose of receiving apportionments made for the benefit of such school pursuant to this act.

§ 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby.

§ 10. This act shall take effect July first, nineteen hundred seventy-four.

NOTE: Section 9 of the bill was added by Chapter 508 of the Laws of 1974.